

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SEP 9 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of the Commission's) GEN Docket No. 90-314
Rules to Establish New Personal)
Communications Services)
)
)

REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

Comcast Corporation ("Comcast"), by its attorneys, hereby submits its Reply to Oppositions to Petitions for Reconsideration filed in response to the Federal Communications Commission's (the "Commission") Memorandum Opinion and Order, adopted June 9, 1994 in the Personal Communications Services ("PCS") rulemaking proceeding.^{1/} Comcast submits this response to address specific issues that have been raised regarding the eligibility of cellular carriers to participate in PCS.

I. TO PROMOTE DIVERSE PARTICIPATION IN PCS, THE PCS MULTIPLE OWNERSHIP ATTRIBUTION STANDARD SHOULD FOCUS ON THE ABILITY TO CONTROL A LICENSEE.

To eliminate inconsistencies in the cellular cross-ownership and PCS multiple ownership rules, Comcast urged the Commission on reconsideration to (1) increase the PCS multiple ownership attribution standard from 5% to 20%, provided that no more than a 5% voting interest is held; and

^{1/} See Memorandum Opinion and Order, Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 FCC 94-144 (adopted June 9, 1994, released June 13, 1994) (hereafter "Order").

(2) increase the attribution standard to 25% in publicly traded corporations, provided that no more than 15% of the voting interests are held.^{2/} As Comcast's Petition observed, the Commission's wireless ownership policies were increasingly and appropriately focusing on an entity's ability to "control" a PCS licensee rather than upon immutable application of particular levels of equity ownership.^{3/}

Since the filing of Comcast's Petition, the Commission has continued to fine-tune its rules to recognize that ownership thresholds should relate to the ability of the equity holder to control a particular entity. The Commission only recently modified the broadband PCS attribution rules imposed upon private corporations to conform to the more generous attribution requirements applied to publicly traded companies. Specifically, the Commission determined that the attribution of revenues, net assets and personal wealth for purposes of establishing

2/ See Comcast Petition for Reconsideration filed July 25, 1994 at 2.

3/ See Id. at 2-7. For instance, as of the filing of Comcast's Petition, the Commission already had (1) adopted a 20% standard for cellular/PCS cross-ownership, recognizing that non-controlling interests greater than 5% offer little potential for anti-competitive behavior; (2) established significantly higher attribution thresholds for the broadband PCS entrepreneurs' blocks (e.g. 49.9% for minority and women-owned entities and 25% for publicly traded companies, even if equity is represented by up to 15% of the voting stock; and (3) adopted the use of a multiplier to determine attribution when indirect interests are held.

eligibility to bid in the Entrepreneur's Blocks will only occur if investors in a corporate applicant own 25% or less passive equity interest, even if the equity ownership includes 15% voting stock.^{4/} In explaining this modification, the Commission specifically stated that "[t]he 15% voting stock limit would ... not rise to the level of a controlling interest ..., could diminish the substantial risks associated with committing funds to a PCS applicant and enhance the potential awards for providing start-up capital"^{5/}

Additionally, in an effort to ensure successful minority and women-owned business participation in the upcoming narrowband PCS auctions, the Commission has proposed the use of Entrepreneurs' Blocks for bidding on the MTA and BTA narrowband licenses, with attribution rules similar to those to be applied in the broadband PCS context. The extension of these more flexible attribution standards for application in the narrowband auctions evidences the Commission's assumption that non-controlling interests in PCS applicants do not necessarily result in "control" and

4/ See Order on Reconsideration, Implementation of Section 309(j) of the Communication Act - Competitive Bidding, PP Docket No. 93-253 FCC 94-217 (adopted August 15, 1994, released August 15, 1994) at ¶ 9.

5/ See Order on Reconsideration at ¶ 10. The Commission is also considering the use of a multiplier for determining the attribution of control groups members' interests for applicants bidding in the Entrepreneurs' Blocks. See generally, Comments of the Commission Staff at Broadband PCS Seminar held August 29, 1994.

provide important benefits, such as access to capital and industry experience that will be critical to the success of PCS. Accordingly, Comcast urges the Commission to adopt the modified PCS multiple ownership attribution standards as set forth in its Petition.

Comcast also requests that the Commission emphasize that these modifications are intended to promote diversity in the PCS marketplace. In its Opposition to Petitions for Reconsideration, APC attempts to establish that cellular investments in PCS licensees threaten the competitive development of PCS.^{6/} Providing increased opportunities for cellular investment in PCS licensees, however, where no control is or can be exercised over the PCS licensees, can only benefit the competitive development of PCS. Providing prospective PCS applicants with greater access to capital and telecommunications experience will permit broader participation by companies that may not be able to compete successfully in the auction process on their own. Increased investment of cellular carriers in PCS applicants, without the ceding of control, cannot constitute a serious competitive concern.

^{6/} See Opposition of APC filed August 30, 1994 at 3-8 and n. 4.

**II. THE COMMISSION MUST MODIFY ITS POST-AUCTION
DIVESTITURE RULES TO PERMIT CELLULAR ENTITIES TO
DIVEST DISQUALIFYING INTERESTS REGARDLESS OF THEIR
POPULATION COVERAGE.**

In its Petition for Reconsideration, Comcast urged the Commission to modify its cellular post-auction divestiture rules to permit all cellular licensees, including those covering more than 20% of the population in a given PCS service area, the option of divesting disqualifying interests to participate in PCS.^{7/} The current 20% divestiture threshold is entirely arbitrary. It bears no relationship to a cellular provider's incentive to utilize a valuable PCS license for which it has expended considerable resources.

Although a number of parties reiterate the Commission's rationale in establishing the 20% threshold, each fails to address the fact that no greater opportunity to abuse the PCS bidding process exists for cellular operators that have a population coverage above the 20% threshold than those below.^{8/} Having paid a significant amount of money for the opportunity to provide PCS in an area where it already has a wireless presence, cellular

^{7/} See Petition for Reconsideration of Comcast Corporation at 7.

^{8/} See Opposition of MCI at 2 (concurring with Commission's determination that the 20% overlap figure represents a reasonable effort to limit bid eligibility to those with a sincere interest in rendering PCS service); Opposition of American Personal Communications at 9-10 (same); Opposition of Pacific Bell Mobile Services at 3-4 (same).

operators will have already demonstrated a firm commitment to providing PCS service. The severe forfeiture penalties, as well as the possibility of being barred from subsequent Commission auctions, are more than adequate to ensure that cellular providers, who must certify that they will comply with the Commission's eligibility rules in their short-form applications, will not engage in bad-faith bidding. It is irrational to presume that cellular carriers would willingly forfeit millions, if not hundreds of millions, of dollars as punishment for violating the Commission's rules in an ill-conceived and ultimately unsuccessful effort to delay the development of competition with cellular operations.^{9/}

The 20% overlap divestiture threshold makes an arbitrary distinction between cellular carriers that cannot be supported by the record developed in this proceeding. But for general statements regarding the "appropriateness" of the 20% limit, the Order provides no basis for its considerable limitation on the flexibility of cellular operators to participate in PCS auctions.^{10/} Moreover,

9/ If the Commission is seriously concerned about the ability of existing service providers to delay competition, it should reconsider treating LEC-affiliated cellular operators and non-LEC affiliated operators in the same way in its PCS eligibility rules. See Comcast Corporation Petition for Reconsideration, Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 at 19-21 (filed December 8, 1993) (Petition for Reconsideration of the Second Report and Order).

10/ See Order at ¶ 143-144.

merely stating that the 20% limit "represents a reasonable effort to limit bid eligibility to those with a sincere interest in acquiring spectrum for the principal purpose of rendering PCS service,"^{11/} without further analysis, provides no basis for defending the requirement on judicial review.

Finally, should the Commission determine that additional safeguards are required for cellular operators providing coverage to a service area population of greater than 20%, the Commission may adopt further penalties or fines narrowly tailored to ensure compliance with applicable cellular divestiture rules. Contrary to MCI's arguments, the Commission is already empowered to "take any ... action that it may deem necessary" once it is determined that licensee default or disqualification involves gross misconduct, misrepresentation or bad faith.^{12/} No further rulemaking proceeding, therefore, would be required.^{13/}

III. THE POST-AUCTION DIVESTITURE PERIOD SHOULD BE EXTENDED FROM NINETY DAYS TO SIX MONTHS.

In its Petition, Comcast urged the Commission to modify the period allotted for divestiture of disqualifying

^{11/} See Opposition of MCI at 2.

^{12/} See Second Report and Order, Competitive Bidding, PP Docket No. 93-253 FCC 94-61 at ¶ 198 (adopted March 8, 1994, released April 20, 1994).

^{13/} See Comments of MCI at 3.

cellular interests from ninety days to six months.^{14/} The additional three months is required to permit cellular operators to locate buyers for the divested interests and to prosecute all the necessary federal, state and local administrative approvals required to transfer ownership.

MCI has ignored the very basis of Comcast's concern by suggesting that cellular providers are authorized to divest the disqualifying interests to an independent interim trustee when no buyer is secured within the ninety day time frame.^{15/} Although Comcast is reasonably confident that a willing buyer could be identified within ninety days, it is irrefutable that accomplishing the transfer, including the negotiation, preparation, filing, processing and Commission approval and consummation, would be impossible within a ninety-day period.^{16/} In fact, Commission approval alone will likely require at least ninety days to obtain.

Moreover, the fact that cellular providers have the option of transferring control of their operations to an independent interim trustee does not address Comcast's practical concern. The interim trustee arrangement is

^{14/} See Comcast's Petition for Reconsideration at 9.

^{15/} See Opposition of MCI at 3.

^{16/} See also Opposition of APC at 11. APC also fails to address the fact that the Commission's statutory processing requirements and capabilities are limited and cannot accommodate the overly-restrictive time constraints for divestiture.

simply not a viable option. A transfer of interests to an independent interim trustee involves significant costs, as well as the loss of the cellular provider's ability to guarantee quality cellular service to its customers. Once operational control of the cellular provider's license is transferred, the cellular carrier can no longer ensure that the quality of service enjoyed by its customers will be maintained.^{17/} Because the cellular provider can no longer direct the operations of its divested cellular interests, such a transfer also will affect the value of the cellular license in the marketplace.^{18/}

The Commission's Rules would provide more realistic opportunities for the divestiture of disqualifying cellular interests if it provided six months for divestiture, and then permitted transfer to an interim trustee once it is determined that the transfer could not be accomplished during the established six-month period. Such a rule would comport with the Commission's intent to provide cellular providers a limited opportunity to commit to

^{17/} In fact, given the importance of sustaining high quality service, a cellular provider may be forced to spend the same amount of time locating an appropriate interim licensee as it would to locate a qualified buyer for its disqualifying cellular interests.

^{18/} Moreover, in many instances, a cellular provider's obligations to its shareholders would be violated if control were transferred to an interim trustee, where the cellular carrier would be barred from ensuring that its contractual responsibilities to its shareholders are met. Such a transfer would expose the cellular provider to potentially significant shareholder liability.

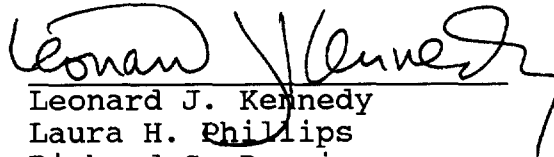
restructuring their disqualifying interests to participate in the PCS auctions.

IV. CONCLUSION

Comcast urges the Commission to promote broad participation in PCS by a wide variety of telecommunications providers by adopting the recommendations made by Comcast in its Petition for Reconsideration and this Reply.

Respectfully submitted,

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September 9, 1994

CERTIFICATE OF SERVICE

I, Richard S. Denning, hereby certify that on this 9th day of September, 1994, I caused a copy of the foregoing Reply to Oppositions to Petitions for Reconsideration to be served by first-class mail, postage prepaid, to the parties included on the attached service list.


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